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No. 97-42

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

EASTERN ENTERPRISES,
Petitioner,

v.

SHIRLEY S. CHATER,
COMMISSIONER OF SOCIAL SECURITY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF AMICI CURIAE PARDEE & CURTIN LUMBER COMPANY AND THE HILLMAN COMPANY IN SUPPORT OF PETITIONER

ARTHUR NEWBOLD
(Counsel of Record)
ETHAN D. FOGEL
ANDREW S. MILLER
DECHERT PRICE & RHOADS
4000 Bell Atlantic Tower
1717 Arch Street
Philadelphia, PA 19103-2793
(215) 994-4000
Counsel for Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF AMICI CURIAE PARDEE & CURTIN LUMBER COMPANY AND THE HILLMAN COMPANY IN SUPPORT OF PETITIONER

This brief is submitted in support of the petitioner. Counsel for all parties have consented to the filing of this amicus brief, and their letters of consent have been filed with the Clerk of the Court by the amici.

INTEREST OF AMICI CURIAE [1]

Amici Pardee & Curtin Lumber Company ("Pardee") and The Hillman Company ("Hillman") have been out of the coal mining business for 38 and 34 years, respectively. Amicus Pardee today is a land company. Amicus Hillman is a diversified investment company.[2] Like the petitioner,

[1] Pursuant to Sup. Ct. R. 37.6, the amici advise the Court that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than the amici or their counsel has made a monetary contribution to the preparation or submission of this brief.

[2] As used herein "Hillman" also refers as appropriate to the affiliates of The Hillman Company or its predecessors which previ-

Eastern Enterprises, the amici have been retroactively assigned responsiblity under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C.A. § 9701-22 (West Supp. 1997) ("the Coal Act"), to fund lifetime health benefits for numerous retired members of the UMWA and certain of their dependents. Like the petitioners, the amici are members of a group of former coal operators which have come to be called the "super-reachbacks."[3] This name refers to the fact that the Coal Act reaches back over decades to make the super-reachbacks pay for current UMWA retiree health benefits even though they never agreed to pay for such benefits. The amici ceased mining coal long before such benefits were first made available to UMWA miners.

The amici agree with the petitioner that it is unconstitutional for the Coal Act to require the petitioner to pay for lifetime health benefits for UMWA miners when it never agreed to pay for such benefits and ceased mining coal long before any NBCWA even arguably provided for such benefits. Like the petitioner, Pardee and Hillman exited the coal industry decades ago, having ceased all coal mining operations in 1959 and 1963, respectively. The amici urge the Court to reverse the judgment of the Court of Appeals.

STATEMENT OF FACTS

A. The Amici Ceased All Coal Mining Operations Over Thirty Years Ago

The amici ceased all coal mining operations over 30 years ago. Pardee closed its last mines and ceased mining operations in 1959. Hillman stopped mining coal in 1963.

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ously mined coal with the United Mine Workers of America ("UMWA"). The Hillman Company itself never actually engaged in coal mining; nor did it sign any wage agreements with the UMWA.

[3] The term "super-reachbacks" refers to those operators that last signed a National Bituminous Coal Wage Agreement ("NBCWA") prior to 1978.

Thereafter, Pardee and Hillman never again conducted coal mining operations, either with UMWA or non-union miners.[4]

By the time Pardee and Hillman stopped mining, each had paid all contributions that they were required to make to the UMWA's Welfare and Retirement Fund of 1950 ("1950 W&R Fund"). Pardee contributed a total of $2,656,000 in premiums to the 1950 W&R Fund or its predecessors up to 1959, when Pardee ceased mining operations. Although Hillman does not have complete records, it estimates that it contributed at least $4,500,000 in premiums to the 1950 W&R Fund from 1952 up to 1963.

The 1950 W&R Fund was financially sound in 1959, when Pardee ceased mining coal, and in 1963, when Hillman ceased mining coal. In fact, in 1963 the 1950 W&R Fund had a positive balance of $113,099,804. R.A. 1111 (1950 W&R Fund Annual Report for 1963 at 3).[5] After the amici ceased mining coal, and until the passage of the Coal Act, they were never again asked or obligated to pay for health benefits provided to UMWA miners.

B. Operation of the UMWA Welfare and Retirement Fund While the Petitioner and the Amici Mined Coal

To understand why there is no rational basis for requiring the petitioner or the amici to pay for lifetime health benefits for UMWA miners today, one must understand how the UMWA 1950 W&R Fund functioned during the period that the petitioner and the amici were active in the coal mining industry. Like the petitioner, the amici signed the National Bituminous Coal Wage Agreement (NBCWA) of 1950, a collective bargaining agreement be-

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[4] After they ceased mining operations, both amici retained coal lands, some of which were leased to coal mining companies.

[5] As used herein "R.A.," refers to the joint appendix submitted to the Court of Appeals below by the parties. As used herein, "J.A." refers to the Joint Appendix filed under Sup. Ct. R. 26.

tween the UMWA and various bituminous coal operators that established a UMWA health benefits plan funded by the coal operators. R.A. 635. Under the 1950 NBCWA and its amendments in 1951, 1952, 1955, 1956, 1958, 1964 and 1966 (the last amendment which either amicus signed) and under the 1968 NBCWA, the petitioner and the amici agreed to fund the 1950 W&R Fund by paying for each ton of coal mined an amount negotiated in successive NBCWAs.[6] Under the 1950 NBCWA, the coal operators' initial contribution rate was 30 cents per ton of coal. R.A. 638.

The 1950 W&R Fund promised no particular or "defined" benefits to its beneficiaries, and so its contributing operators, such as the petitioner and the amici, were not required to fund any particular type of benefits for the beneficiaries. Rather, the contributing operators were only obligated to pay their per-ton contributions to the Fund. Thus, the 1950 W&R Fund was, at best, a "defined contribution" fund as opposed to a "defined benefit" fund.[7]

Instead of promising any defined benefits, the 1950 NBCWA only stated in general terms that the purpose of the 1950 W&R Fund would be to:

> make payments from principal or income or both, of (1) benefits to employees of said Operators, their families and dependents for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or life insurance, disability and sickness insurance or accident insurance; (2) benefits with respect to wage loss not otherwise compensated for at all or adequately by tax supported agencies created by federal or State law; (3) benefits on account of sickness, temporary disability, permanent disability, death or retirement; (4) benefits for any and all other purposes which may be specified, provided for or permitted in Section 302(c) of the 'Labor-Management Relations Act, 1947' as agreed upon from time to time by the Trustees including the making of any or all of the foregoing benefits applicable to the individual members of the United Mine Workers of America and their families and dependents, and to employees of the Operators other than those exempted from this Agreement; and (5) benefits for all other related welfare purposes as may be determined by the Trustees within the scope of the provisions of the aforesaid 'Labor-Management Relations Act, 1947.'

R.A. 639 (1950 NBCWA at 60-61). No further detail was supplied on the benefits to be provided by the Fund. Instead, the trustees of the Fund were given complete authority to determine who would be eligible and what benefits were to be paid. *See* R.A. 639 (1950 NBCWA at 61). Thus, the 1950 NBCWA provided that the trustees had:

> full authority . . . with respect to questions of coverage and eligibility, priorities among classes of benefits, amounts of benefits, methods of providing or arranging for provisions for benefits, investment of trust funds, and all other related matters.

R.A. 639. (1950 NBCWA at 61). The trustees of the 1950 W&R Fund retained this ultimate authority to set benefits during the entire time that the amici contributed to the Fund.

The benefits that the trustees of the 1950 W&R Fund decided to pay were never permanently guaranteed, even

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[6] R.A. 635 (1950 NBCWA); R.A. 649 (1952 amendment); R.A. 654 (1955 amendment); R.A. 657 (1956 amendment); R.A. 660 (1958 amendment); R.A. 666 (1964 amendment); R.A. 686 (1966 amendment); R.A. 702 (1968 NBCWA). Although Hillman ceased mining coal in 1963 and made its last payments to the 1950 W&R Fund that year, it signed the 1964 and 1966 amendments to the 1950 NBCWA and the 1968 NBCWA because it employed some UMWA-represented employees in a non-mining capacity until 1969.

[7] *See Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 230 (1986) (O'Connor, J. concurring) ("a defined contribution plan does not specify benefits to be paid").

during the term of the then-current NBCWA—they could be modified or entirely revoked by the trustees at any time without legal restriction. The Fund's 1955 Annual Report stressed that:

> Trustee regulations governing Benefits specifically provide that all Benefits which have been authorized are subject to termination, suspension, revision, or amendment by the Trustees in their discretion at any time. . . . *No vested interest in the Fund extends to any Beneficiary.* The Trustees have full authority within the terms of the Trust Agreement and applicable law to determine the types and amounts of Benefits which shall be granted, and to establish eligibility requirements.

R.A. 955-56 (1958 Report of the 1950 W&R Fund at 20-21) (emphasis added). Subsequent annual reports issued during the time that the petitioner and the amici mined coal repeated this statement.[8] Each beneficiary was officially notified of this governing provision at the time his benefits were authorized. *See* Annual Reports cited in note 8 *supra*.

Thus, the amici never promised that the 1950 W&R Fund would provide lifetime benefits to the UMWA miners. *See Blue Diamond Coal Co. v. Shalala,* 174 B.R. 722, 724 (E.D. Tenn. 1994) (noting that the Fund "promised its beneficiaries no permanent or perpetual benefits. In fact, beneficiaries of this plan were specifically told that benefits were revocable and not vested"), *aff'd,* 79 F.3d 516 (6th Cir. 1996).

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[8] See R.A. 995-96 (1959 Report of the 1950 W&R Fund at 27-28); R.A. 1028-29 (1960 Report of the 1950 W&R Fund at 19-20); R.A. 1047 (1961 Report of the 1950 W&R Fund at 5); R.A. 1080 (1962 Report of the 1950 W&R Fund at 5); R.A. 113 (1963 Report of the 1950 W&R Fund); R.A. 1146 (1964 Report of the 1950 W&R Fund at 8); R.A. 1191 (1965 Report of the 1950 W&R Fund at 18); R.A. 1223 (1966 Report of the 1950 W&R Fund at 19).

The 1950 W&R Fund trustees frequently exercised their unilateral authority to terminate, decrease, or otherwise modify the benefits paid to beneficiaries. For example, in 1950 the trustees "rescinded health benefit coverage for 'the treatment of paraplegics and severely handicapped miners at special treatment and rehabilitation centers.' " R.A. 1238, 1235 (Resolution Nos. 12 and 11 of the 1950 W&R Fund). In 1953, the trustees "rescinded" the payment of death benefit gratuities previously paid by the Fund. R.A. 1246, 1231 (Resolution Nos. 25 and 9 of the 1950 W&R Fund). In 1954 the trustees rescinded the provision of "maintenance aid for dependent children and widows" of miners killed in the mines. R.A. 1247 (Resolution No. 35 of the 1950 W&R Fund). The 1950 W&R Fund had previously been paying $40.00 per month for "dependent children of deceased miners who are living with their mothers," $10.00 for each additional child and $30.00 "less regular income received from any source" for "widows of miners fifty (50) years of age or over who have no dependent children." R.A. 1243 (Resolution No. 16 in the 1950 W&R Fund). Also in 1954 the trustees "rescinded" the provisions of "rehabilitation" benefits and maintenance aid to miners." R.A. 1248 (Resolution No. 36 of the 1950 W&R Fund). The 1950 W&R Fund had previously been paying a "rehabilitation benefits of $30.00 per month, with an additional $10.00 for their wives and additional $10.00 for each child under 18 years of age." R.A. 1240 (Resolution No. 14 of the 1950 W&R Fund).

These and many other cutbacks were necessary because coal production fell at various times during the 1950's and 60's, and consequently the contributions from the coal operators also declined. With the Fund operating on a "pay-as-you-go" basis, it had no choice but to reduce benefits in order to preserve fiscal stability. Thus, no miner could possibly have had the impression that he was somehow guaranteed defined lifetime benefits.

During the time that the petitioner and the amici mined coal, the 1950 W&R Fund trustees also acted unilaterally to modify the eligibility requirements for a variety of benefits whenever the financial situation of the 1950 W&R Fund required. In an effort to curtail hospital expenses in 1957, the 1950 W&R Fund unilaterally implemented what were then radical changes to procedures for hospital admissions. R.A. 943-948 (1958 Report of the 1950 W&R Fund at 7-12). In 1960 the trustees took further dramatic steps to "curtail the excess of expenditures over income." R.A. 1011 (1960 Report of the 1950 W&R Fund at 2). To reduce these expenditures the trustees: "limited or terminated eligibility for Trust Fund Benefits," *id.*; "limited eligibility of unemployed miners for [Hospital, Medical, and Surgical] Services to one year after the date of the last regular employment in a classified job in the mine of [a signatory] operator . . . and terminated eligibility of miners for these services even though they may be, or may have been, performing classified work, if self-employed or in any way connected with ownership, operation or management of a mine." *Id.* (R.A. 1021). The trustees also eliminated "Funeral Expense and Widows and Survivors Benefits" for dependents of a deceased miner if the miner was unemployed for more than a year since his last job with a signatory operator. R.A. 1027 (1960 Report of the 1950 W&R Fund at 18). In 1961 the trustees reduced the amount of monthly pension benefit by 25 percent. R.A. 1044 (1961 Report of the 1950 W&R Fund at 2).

Thus, the UMWA miners were well aware that the trustees of the 1950 W&R Fund regularly exercised their authority to change, reduce or eliminate benefits or modify the rules governing eligibility for benefits. R.A. 1353 (Coal Commission, *Coal Commission Report, A Report to the Secretary of Labor and the American People* (Nov. 1991) ("Coal Commission Report") at 23); *Blue Diamond*, 174 B.R. at 724.

C. In 1974 the BCOA and the UMWA Created a New System of Defined Health Benefits

As was noted above, the amici ceased mining coal in 1959 and 1963, and the petitioner ceased mining coal in 1965. Years after the petitioner and the amici left the industry, the BCOA and the UMWA materially changed the UMWA health benefits funding system. In the NBCWA signed in 1974, the BCOA and UMWA agreed to dissolve the 1950 W&R Fund and replace it with two new health benefit funds and two new pension funds. The liquidated assets of the 1950 W&R Fund—$91,132,782—were transferred to one of the two new pension funds. Meanwhile, the BCOA and the UMWA created two new health benefit funds: the UMWA 1950 Benefit Plan and Trust and the UMWA 1974 Benefit Plan and Trust (hereinafter referred to collectively as the "1974 Health Benefit Funds").[9] The 1974 Health Benefit Funds started with zero funding because, as was noted above, the assets of the dissolved 1950 W&R Fund had been transferred to a new pension fund.

The 1974 Health Benefit Funds were established as defined benefit plans, meaning that the miners and other beneficiaries were promised defined types and levels of benefits for the first time in the history of the UMWA's health and welfare funds. Moreover, in 1974 the discretion of the Funds' trustees to alter or terminate benefits was eliminated. *See* R.A. 759 (1974 NBCWA at 106); R.A. 1253 (1977 Annual Report at 3).

As part of the new defined benefit package, the 1974 NBCWA promised for the first time that many beneficiaries would receive a "Health Services card for life" from the 1974 Health Benefit Funds. R.A. 755-59. For example, the 1974 NBCWA provided that any pensioned miner

[9] R.A. 748 (1974 NBCWA at 84). The 1950 Benefit Fund and the 1974 Benefit Fund provided health and other benefits, but not pension benefits, to coal miners who retired either before January 1, 1976 (1950 Benefit Fund) or after January 1, 1976 (1974 Benefit Fund).

would "retain his Health Services card until death" and that "his widow will retain a Health Services card until her death or remarriage." R.A. 755 (1974 NBCWA at 99). The widows of miners disabled as a result of a mine accident before May 29, 1946 were provided health benefits until death or remarriage. R.A. 758 (1974 NBCWA at 105).

As a result of the same 1974 NBCWA, the BCOA and the UMWA also added large numbers of newly-eligible beneficiaries who had never ben covered before. Prior to the 1974 NBCWA, only "Widows of Men Killed in Mines" were entitled to continued benefits after the death of a miner. The 1974 NBCWA extended health benefits to all widows of UMWA retirees. R.A. 758 (1974 NBCWA at 105). Health services cards were also provided, for the first time under the 1974 NBCWA, to disabled miners and the disabled and mentally retarded children of miners. R.A. 758-59 (1974 NBCWA at 105-106). The 1977 Annual Report and the UMWA Health and Retirement Fund noted that "as a result, the number of eligible benefit recipients jumped dramatically. Thousands of widows and disabled mine workers became eligible for benefits not previously available." [10]

The 1978 NBCWA, which neither the petitioner nor the amici signed, again made major changes in the health benefits program for the UMWA retirees, their spouses and dependents. That contract contained, for the *first* time, a "guarantee clause," which provided that signatory operators would fully fund health benefits for the term of the agreement in order to prevent funding shortfalls. To achieve this full funding, the BCOA assumed the unilateral authority to increase contribution rates from signatories to the 1978 NBCWA as necessary. R.A. 788.

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[10] According to the 1976 Annual Report of the UMWA Health and Retirement Funds, during the first two years of the 1974 NBCWA the number of beneficiaries grew by 28 percent—from 630,000 to 805,000.

Also in 1978, the Plan documents for the 1974 Health Benefit Funds were amended through negotiations between the BCOA and the UMWA to include, for the *first* time, what is known as the "evergreen" clause, which required signatories to make plan contributions as required under the 1978 NBCWA and "any successor agreements thereto" in accordance with contribution formulas provided by the agreement.[11] Thus, because of the changes made in 1974 and 1978, the contributing coal operators of the BCOA were obligated to fund a defined level of benefits, rather than merely make, as under the 1950 W&R Fund, a fixed per-ton contribution. This was a significant change because it meant that BCOA coal operators could suddenly become liable for much higher contributions if the cost of the benefits suddenly increased because, for example, the cost of health care increased.[12]

In the face of these new undertakings, in the late 1980's the 1974 Health Benefit Funds began to experience revenue shortfalls resulting in serious funding deficits. Ultimately, these funding deficits led Congress to pass the 1992 Coal Act. The Act rescued the 1974 Health Benefit Funds by creating the UMWA Combined Benefit Fund (the "Combined Fund") to assume their liabilities.

D. The Amici Have Been Made Liable for Paying Lifetime Benefits to UMWA Miners Under the Coal Act Although They Never Agreed To Do So

Under the Coal Act, the petitioner and the amici are now required to pay premiums to the Combined Fund in

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[11] R.A. 787-88. In this brief, when reference is made to "lifetime benefits," Health Services cards "for life," or the "evergreen clause" obligations, the amici are not expressing a view concerning whether the "lifetime benefits" or "evergreen clause" obligations, or the obligation to provide a Health Services card "for life," extended beyond the life of the relevant NBCWA. The amici were not parties to the 1974 or later NBCWAs.

[12] The 1974 Health Benefit Funds' 1975 Annual Report characterized the changes wrought by the 1974 NBCWA as "monumental" and stated that they would "have long-lasting and historic effects."

order to pay for lifetime health benefits for retired UMWA miners, their spouses and certain dependents. Congress imposed this liability on the petitioner and the amici even though they had no part in creating any expectation of lifetime benefits on the part of UMWA retirees.

More specifically, under the Act Hillman has been billed for 376 former employees or their dependents and has been assessed for total premiums of $3,601,200 for the period ending September 30, 1998. Hillman's total future projected liability under the Coal Act is estimated to be at least $7,020,000.

As of the current time, Pardee has been billed for 115 former employees or their dependents. Total premiums assessed for these beneficiaries for the period ending September 30, 1998, were $1,119,900. Pardee's total projected future liability under the Coal Act is estimated to be at least $3,376,000.

Seventy-two percent of the beneficiaries assigned to Pardee are surviving spouses or dependents. Seventy-seven percent of the beneficiaries assigned to Hillman are surviving spouses or dependents. None of these persons was entitled to extended benefits from the 1950 W&R Benefit Fund at the time the amici mined coal.[13] Many of the former UMWA miners assigned to the amici worked for them for short periods of time back in the 1940's or 1950's, some for just a few months. They often worked for many other employers, frequently non-coal mining companies, for decades thereafter. They could not have rationally expected the amici to pay for lifetime retiree health benefits. Nevertheless, under the Coal Act, the amici must pay for their benefits for life, as well as lifetime benefits for their spouses and dependents, at a per person premium of $2,343.31 in 1997-98, potentially escalating each year

[13] Only 30 percent of the persons who received benefits under the Coal Act from the UMWA Combined Fund are retired UMWA miners. The remaining 70 percent are either surviving spouses or were dependents of the former miners.

thereafter. 26 U.S.C.A. § 9704(b)(2) (West Supp. 1997).

In addition, the Coal Act requires the petitioner and the amici to contribute, as necessary, for benefits for miners and relatives who were not assigned to anyone because none of the coal mining companies they worked for—or the "related persons" of those companies—remain in business. *Id.* § 9704(a)(3).[14] Under section 9704(d), an additional annual premium may be assessed against each company for its pro rata share of unassigned beneficiaries. None of the unassigned beneficiaries ever worked for either amicus or has any other connection of any kind to them. Yet by the Fund's own projections, contributions on their behalf will be required well into the middle of the next century.

SUMMARY OF ARGUMENT

The judgment of the Court of Appeals should be reversed because the Coal Act is unconstitutional as applied to the petitioner and the amici. The Coal Act violates the Due Process Clause of the Fifth Amendment because Congress could not have rationally concluded that there is any causal connection between the conduct of the petitioner and the amici and the harm sought to be redressed by the Act—the funding deficits suffered by the UMWA's 1974 Health Benefit Funds in the late 1980's and 1990's. The petitioner and the amici cannot be found responsible for causing the Funds' deficits because they did not participate in the creation of the 1974 Health Benefit Funds. Whatever else may have contributed to these deficits, the petitioner and the amici could not have contributed to them because they never promised the UMWA miners or their dependents defined or lifetime benefits.

[14] As of October 1, 1994, of the 107,049 beneficiaries of the Combined Fund, 24,787 were unassigned beneficiaries.

If the 1974 Health Benefit Funds had not promised defined benefits, they would have been free to reduce the level of benefits paid in order to maintain fiscal balance. Because the petitioner and the amici never agreed to be bound by the 1974 or later NBCWAs, Congress cannot rationally impose liability on them to pay for those benefits.

ARGUMENT

AS APPLIED TO THE PETITIONER AND THE AMICI, THE COAL ACT VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

A. The Analysis of the Coal Act Under the Due Process Clause Properly Focuses on the Petitioner's Lack of Causal Connection to and Responsibility for the 1974 Health Benefit Funds' Deficits

In its petition for a writ of certiorari (the "Petition"), the petitioner reviewed the Court's recent cases discussing the Black Lung Benefits Act of 1972 and the Multiemployer Pension Plan Amendments Act of 1980. The Petition explained how in those cases the Court framed the appropriate analysis of legislation such as the Coal Act under the Due Process Clause of the Fifth Amendment. *See* Petition at 14-15.

> Our recent cases leave open the possibility that the imposition of retroactive liability on employers for the benefit of employees may be arbitrary and irrational *in the absence of any connection* between the employer's conduct and some detriment to the employee.
>
> * * * *
>
> [I]mposition of this type of retroactive liability on employers, to be constitutional, must rest on some basis in the employer's conduct that would make it rational to treat the employees' expectations of benefits under the plan as the employer's responsibility.

Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 229 (1986) (emphasis added). Thus, a statute that imposes retroactive liability will violate the Due Process Clause if there is no causal connection between the harm sought to be redressed by a statute and the conduct of the party burdened by the statute.

Accordingly, the question presented in this case is whether the petitioner in any way caused the economic problem that the Coal Act was designed to solve—i.e., the funding deficits suffered by the UMWA's 1974 Health Benefit Funds in later years. If the Court finds that there is no causal connection between the petitioner's conduct and the 1974 Health Benefit Funds' deficits, then the Coal Act must be found unconstitutional under the Due Process Clause.[15] The amici agree with the petitioner that it cannot be found to have contributed to causing the Funds' financial problems for the reasons set forth below, and that is equally true of the amici.

B. The Congress Could Not Have Rationally Concluded that the Amici were Responsible for Causing the 1974 Health Benefit Funds' Deficits

The Congress could not have rationally concluded that the petitioner or the amici had any responsibility for causing the 1974 Health Benefit Funds' deficits in the late 1980's and early 1990's because the "but for" cause of those funding dificits first arose after the petitioner and the amici had stopped mining coal. As was noted above, the 1974 Health Benefit Funds began to experience revenue shortfalls in the late 1980's and early 1990's for various reasons. Yet the Court need not even consider the specific factual reasons why the 1974 Health Benefit Funds suf-

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[15] The petitioner correctly noted in its Petition that the Due Process Clause and the Takings Clause each retains distinct meaning and requires separate analysis. Petition at 22. In order to narrow the focus of this brief, the amici do not discuss the Takings Clause analysis here but rather leave that issue for the petitioner.

fered such revenue shortfalls, because those revenue shortfalls were not the "but-for" cause of the Funds' deficits. The "but-for" cause of the Funds' deficits was the fact that the 1974 and later NBCWAs promised that the 1974 Health Benefit Funds would provide defined health benefits for the UMWA miners and their spouses. If the 1974 Health Benefit Funds had not promised their beneficiaries defined benefits, they could simply have reduced benefits when they began to experience revenue shortfalls. However, once they promised defined benefits, the 1974 Health Benefit Funds were committed to paying fixed levels of benefits, which in the face of revenue shortfalls meant that funding deficits became unavoidable. *See Connolly*, 475 U.S. at 230 (O'Connor, J. concurring) (under defined contribution plans which do not specify benefits to be paid " 'there can never be an insufficiency of funds in the plan to cover promised benefits' ") (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 364 n.5 (1980)).

In contrast, when the petitioner and the amici participated in the 1950 W&R Benefit Fund, that Fund was, at most, a defined contribution plan which by definition promised no defined benefits to UMWA miners. In fact, as was noted above, the trustees of the 1950 W&R Fund had total discretion to revoke or reduce the benefits in order to preserve the solvency of the Fund, and they exercised this discretion frequently throughout the 1950's and 1960's. Because the petitioner and the amici never agreed to pay the UMWA miners defined benefits and never participated in a fund that did, they had nothing to do with the funding deficit. Such a deficit would have been impossible without the 1974 Health Benefit Funds' promises to pay defined benefits. It is irrational to impose liability upon the petitioner and the amici for promises they neither made nor broke.

C. The Court of Appeals Below Erred in Concluding that the Amici Made Promises of Lifetime Benefits to the UMWA Miners

In the decision below, the Court of Appeals sought to justify Congress's decision to hold the petitioner responsible for paying the UMWA retirees' lifetime health benefits on several grounds. Most significantly, the court concluded that the petitioner and all other signatories of pre-1974 NBCWAs had "made an implicit commitment to furnish" lifetime benefits to the miners. *See Eastern Enterprises v. Chater*, 110 F.3d 150, 157 (1st Cir. 1997). Yet this conclusion lacks any factual foundation because there is no evidence that the petitioner, the amici, or other coal operators which left the industry before the 1974 NBCWA, ever promised lifetime benefits to the UMWA miners, explicitly or implicitly. All of the facts establish the opposite.

Even assuming for the sake of argument that, in addition to promising defined benefits, the BCOA promised lifetime benefits as well in the 1974 NBCWA, neither the petitioner nor the amici joined in such promises. Prior to 1974, the NBCWAs signed by the BCOA and the UMWA explicitly reserved to the trustees of the 1950 W&R Fund the right to reduce or terminate all benefits completely or change eligibility rules to drop miners from the Fund. The 1950 W&R Fund, through its written notices, repeatedly told the UMWA miners that their health benefits were not vested and could be taken away at the discretion of the trustees. Indeed, the benefits were often cut back drastically in the 1950's and 1960's when the petitioner and other operators were supposedly, according to the Court of Appeals, making this implicit promise of lifetime benefits.[16] In the face of the historical record,

[16] In the context of ERISA and the Multiemployer Pension Plan Amendments Act of 1980, this Court (Justice O'Connor concurring) specifically noted that "if a plan had regularly undergone increases and reductions in accrued benefits prior to ERISA, any contention

there is simply no way that the Congress could have rationally concluded that the petitioner or the amici created an expectation on the part of the UMWA miners that they would receive lifetime benefits.

The Court of Appeals below cited *no* historical facts to support its conclusion. In fact, it cited only three other circuit court decisions: *Lindsey Coal Mining Co. v. Chater*, 90 F.3d 688 (3d Cir. 1996), *In re Blue Diamond Coal Co.*, 79 F.3d 516 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 682 (1997), and *Davon, Inc. v. Shalala*, 75 F.3d 1114 (7th Cir. 1996), *cert. denied sub nom. Templeton Coal Co. v. Shalala*, 117 S. Ct. 50 (1996). Each of these three opinions in turn fails to cite any historical evidence showing that the petitioner, or any other signatory of pre-1974 NBCWAs, had made a promise of lifetime health benefits to the UMWA miners, explicitly or implicitly. *Lindsey* cited only to the House Senate Conference Committee Report that produced the Coal Act. That Conference Committee Report itself only declared in a conclusory fashion that promises had been made, without specifying when the promises had been made or who had made them. *Lindsey*, 90 F.3d at 694 (citing 138 Cong. Rec. S17603 (daily ed. Oct. 8, 1992)).

> [The] multiemployer benefit plans were created in collective bargaining negotiations between the United Mine Workers of America ("UMWA") and the Bituminous Coal Operators Association ("BCOA") and perpetuated in successive bargaining agreements. Under those agreements, retirees and their dependents have been promised lifetime health care benefits.

138 Cong. Rec. S17603 (daily ed. Oct 8, 1992). The Conference Committee did not specify which collective

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that employers caused employees to rely on a promise of fixed benefits might carry even less weight." *Connolly*, 475 U.S. at 235. So too here, the fact that the trustees of the 1950 W&R Fund modified benefits frequently, including reducing them or wiping out whole classes altogether, must have prevented any expectation of lifetime benefits by the miners.

bargaining agreement promised lifetime benefits. It certainly did not state, nor could it have correctly stated, that the operators had promised lifetime benefits at any time before the 1974 NBCWA. It therefore seems that based on one conclusory remark in a Congressional Conference Committee Report, the *Lindsey* court concluded that all signatories of NBCWAs made promises of lifetime benefits.

In *Blue Diamond*, the second decision cited by the Court of Appeals below, the Sixth Circuit correctly stated that "[i]t is undisputed that the NBCWAs did not contain an explicit promise of lifetime benefits until the 1974 NBCWA agreement." 79 F.3d at 522. But for some unexplained reason, the *Blue Diamond* court decided to ignore this fact and proceeded to adopt a completely inconsistent conclusion reached by the Seventh Circuit in *Davon*: the "UMWA members had a legitimate expectation of lifetime benefits before the 1974 NBCWA based on various funds' more than 30-year history of continuous payment of benefits and the statements of coal industry officials." *Blue Diamond*, 79 F.3d at 522 (citing *Davon*, 75 F.3d at 1124-25).

The Seventh Circuit's decision in *Davon* is thus the terminus of this circular chain of reasoning. In *Davon*, the Seventh Circuit concluded that "the fact that plaintiffs never contractually agreed to provide lifetime benefits does not rebut the rationality of finding that they contributed to the expectation of lifetime benefits." *Davon*, 75 F.3d at 1125. "The Coal Commission and Congress found that the promise of lifetime benefits dates back to the 1940s even though it is not explicit in any NBCWA until 1974." *Id.* This conclusion is utterly flawed. As was explained above, Congress made no such finding. Neither did the Coal Commission. The Coal Commission stated as a general rule that "retired coal miners have legitimate expectations of health care benefits for life; that was the promise they received during their working years," but it never

found that the BCOA ever promised lifetime benefits prior to the 1974 NBCWA. J.A. 245a-46a. (Coal Commission Report at 1).[17] In fact, the Coal Commission Report recognized that the Funds took away benefits from miners, such as their health cards, during difficult economic times in the 1960's and made other retrenchments to benefits. J.A. 267a (Coal Commission Report at 22) ("in 1960, the Trustees ruled that unemployed miners could only have health cards for one year and from 1962 to 1966 health cards were taken from the employees of companies with delinquent contributions").

Recognizing it was on shaky ground, the *Davon* court concluded, without reference to any document, that even if explicit promises of lifetime benefits were never made, all of the NBCWAs signed before 1974 created "a reasonable expectation of lifetime health benefits" on the part of the miners "by creating a continuous mechanism for providing UMWA multi-employer-sponsored health benefit plans. While individual coal operators such as plaintiffs have come and gone, UMWA retirees have received health coverage paid for by successive UMWA benefit trusts." *Id.* But this is a distortion of history. As was noted above, the UMWA miners were constantly told that their health benefits were not vested, and indeed those benefits were

[17] The Coal Commission must have recognized that the pre-1974 NBCWA signatories made no explicit promises of lifetime benefits, because the Commission itself recommended only that signatories to the 1978 NBCWA and thereafter should be liable for funding the UMWA miners' lifetime benefits. In its "Industry-Wide Funding Plan," the Commission recommended that "CONGRESS SHOULD IMPOSE A STATUTORY OBLIGATION TO CONTRIBUTE ON SIGNATORIES TO THE [NBCWA] OF 1978 AND ANY SUCCESSOR AGREEMENT." J.A. 309a (Coal Commission Report at 63 (emphasis in original). In its consensus statement the Commission also drew a limit at the 1978 NBCWA, noting that "[c]ontribution obligations should be statutorily imposed on past signatories . . . possibly reaching back to the Signatory Class of 1978." J.A. 304a (Coal Commission Report at 58).

often cut back drastically. Thus, the *Davon* court's conclusion that the miners would have had a reasonable expectation of lifetime benefits based on the defined contribution NBCWAs signed by the BCOA and the UMWA from 1947 until 1971 is simply irrational and cannot support a finding of constitutionality. Because this faulty reasoning provides the sole foundation for the *Eastern* court's conclusion that miners were promised lifetime benefits, that conclusion must be disregarded as well.[18]

In *Lindsey*, the Third Circuit found it was irrelevant that the plaintiff coal operator "never explicitly promised lifetime benefits. . . . Congress found that the promise was implicit, and of course, Congress does not have to be correct in its beliefs—just reasonable." 90 F.3d at 694. This statement cannot be right. As a matter of simple logic and common sense, Congress cannot be found to have acted reasonably when it purports to find specific historical facts and demonstrably gets them wrong.

The Court of Appeals below purported to buttress its conclusion by referring to a hypothetical deal in which the coal operators implicitly promised the UMWA lifetime

[18] It defies common sense to think that the UMWA miners could have expected lifetime health benefits when their benefits were constantly being cut back or suspended and when they were being told regularly by written notices that the benefits were subject to termination at the discretion of the trustees. Moreover, prior to the mid-1960's few employers provided *any* health benefits to their retirees. *See* John R. Woodrum & Larry P. Rothman, *Proposals for Funding UMWA Retiree Health Benefits: The Constitutional Dimensions*, 93 W. Va. L. Rev. 633, 635 & n.8 (1991) (citing Education and Public Welfare Division, Congressional Research Service, Pub. IB88004, *Health Benefits for Retirees: An Uncertain Future* (1990)). Even today, the average American who receives health benefits from his or her employer has no expectation of lifetime benefits, barring an explicit promise of lifetime retiree health benefits from the employer. At most, the average worker who is fortunate enough to receive health benefits from his employer expects to receive them only while employed by that employer.

benefits and the UMWA promised in return to accept mechanization of the mines. *See Eastern Enterprises*, 110 F.3d at 157 (stating that the 1950 NBCWA "created a welfare and retirement fund in consideration for workers' acquiescence in the automation of the mines").[19] Nevertheless, the Court of Appeals' description of a mechanization-for-life-time benefits-deal is pure Coal Act mythology. The historical record is clear that UMWA President John L. Lewis supported mechanization of the mines as early as 1920 in order to improve miners' wages. Thus, the coal operators had no need to promise anything like lifetime benefits in order to induce the UMWA to accept mechanization.[20]

Instead, the historical record shows that a different deal was struck in the 1950 NBCWA. Coming off the protracted strike of 1949, the operators received assurance that the union would respect their right to control their facilities and would not encourage wildcat strikes by invoking the "willing and able" provision found in the 1948 NBCWA. In return, the operators agreed to cooperate with the union in administering the welfare and retirement fund and consented to the appointment of John L. Lewis' ally, Josephine Roche, as the neutral trustee—thus assuring UMWA control over the trust. *See* Melvyn Dubofsky and

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[19] To support this supposed historical fact the Court of Appeals below cited only the decision of the Fourth Circuit in *Holland v. Keenen Trucking*, 102 F.3d 736, 741 (4th Cir. 1996). The *Holland* court stated that "the 1950 UMWA Plan was instituted in exchange for the UMWA's acquiescence in the mechanization of the mines" but cited no historical evidence to support this assertion. *Id.* at 741.

[20] In fact, as far back as 1920, it was noted that " 'the United Mine Workers have always been favorable to and have never opposed the introduction of machinery or labor-saving machinery in the operation of mines.' " Keith Dix, *What's a Coal Miner to Do? The Mechanization of Coal Mining* (1988) at 133-34. UMWA President John L. Lewis not only favored the use of mine mechanization technology, but believed it was the key to the long-run stabilization of the whole industry. *Id.* at 161.

Warren Van Tine, *John L. Lewis: A Biography* (1977) at 489; Robert H. Zieger, *John L. Lewis, Labor Leader* (1988) at 155-56.

D. The Amici Did Not "Dump" Any Obligation to Pay Lifetime Benefits to UMWA Miners Upon Leaving the Industry in 1959 and 1963

Several circuit courts have concluded that the petitioner and other super-reachbacks should be liable under the Coal Act because on leaving the industry they "dumped" their purported obligations to pay the UMWA miners' lifetime benefits, leaving the remaining BCOA companies to pick up the tab. This conclusion is factually erroneous. First, at the time the petitioner and the amici left the industry the miners had no right to lifetime or any other defined benefits—thus, there was no burden of lifetime or any other defined benefits to dump onto the BCOA. Second, when each NBCWA terminated, the continued provision of health care benefits depended on the negotiation and signing of a new NBCWA. During negotiations for each new NBCWA, the BCOA was not forced to continue to provide benefits for the miners. Rather, even knowing full well that former operators such as the petitioner and the amici would no longer be making contributions, the BCOA (in exchange for concessions by the UMWA which provide no benefit to the super-reachbacks) voluntarily agreed to pay health benefits for employees who had already retired and never even approached the departed operators for additional contributions.

Not only was the BCOA legally entitled unilaterally to stop providing benefits to retired UMWA miners,[21] but it was not forced to transform the limited scope of the 1950

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[21] As a legal matter, because provision of health benefits to retirees is a permissive rather than a mandatory subject of bargaining under the National Labor Relations Act, 29 U.S.C. §§ 151-169, the UMWA could not strike even if the BCOA unilaterally decided it would no longer fund retiree benefits.

W&R Fund into the contractual equivalent of universal health coverage for retired miners, their surviving spouses, and their dependents. To this end, decades after the petitioner and the amici had stopped mining coal, the BCOA, but not the petitioner or the amici, voluntarily agreed to: 1) provide to miners and certain dependents a "Health Service card for life;" 2) expand the class of beneficiaries to include widows and dependents of retirees; 3) guarantee sufficient contributions to pay for the newly defined benefits; 4) authorize an increase in the rate of contribution whenever necessary to avoid funding shortfalls; and 5) commit signatory employers continuing in the coal business to continue to make contributions as specified in future contracts. In exchange for each of those new concessions on health care, the BCOA—but not the petitioner or the amici—presumably obtained concessions from the UMWA which were of benefit to its member companies' coal mining operations. Thus, instead of blaming the petitioner or other super-reachbacks for dumping non-existent obligations, the courts should have recognized that the BCOA voluntarily assumed new, drastically expanded obligations long after the petitioner and the amici had ceased mining coal.

E. The Fact that the Petitioner and the Amici May Have "Profited from the Labor of Miners" Does Not Justify Imposing Retroactive Liability Under the Coal Act

Certain circuit courts have concluded that it is rational to impose Coal Act liability upon the super-reachbacks because they purportedly profited from the labor of miners while they were engaged in mining. *See In re Blue Diamond Coal*, 79 F.3d at 523. This conclusion completely ignores the fact that while the super-reachbacks may have "profited" from the labor of their miners at the time they mined coal, they paid the miners wages and benefits for their labor, thus fulfilling any economic obligation that they might have had to them. Moreover, according to this rationale, Congress could impose Coal Act liability on

anyone in the United States, because every person in the national economy benefited from coal in some way—whether for heating homes, fueling electric utilities, or powering railroad travel. The infinite reach of the rationale proves its absurdity.

Finally, that argument overlooks the fact that many of the UMWA miners assigned to the super-reachbacks, such as the petitioner and the amici, worked for them for only short periods of time early in their careers before proceeding to work for other employers. If the petitioner and the amici are to be taxed for profiting from the labor of the miners early in their career, why shouldn't the miners' subsequent employers also be taxed? The fact that there is not a good answer to this question again reveals the absurdity of the "profited from their labor" rationale.

CONCLUSION

For all of the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

ARTHUR NEWBOLD
(Counsel of Record)
ETHAN D. FOGEL
ANDREW S. MILLER
DECHERT PRICE & RHOADS
4000 Bell Atlantic Tower
1717 Arch Street
Philadelphia, PA 19103-2793
(215) 994-4000
Counsel for Amici Curiae

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